Supreme Court, U. S.
FILED
JAN 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-539

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MAINE, PETITIONER

v.

CHARLES ALBERT DANA, JR.

and

ALLAN SOCKABASIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Statement	1
Argument	5
Conclusion	13

CITATIONS

Cases:

Joint Tribal Council of Passamaquoddy Tribe v. *Morton*, 528 F.2d 370	2
Morton v. *Ruiz*, 415 U.S. 199	7
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661	12
United States v. *Holliday*, 70 U.S. (3 Wall.) 407	8
United States v. *John*, 437 U.S. 634	3, 7
United States v. *Martine*, 442 F.2d 1022	8
United States v. *McGowan*, 302 U.S. 535	8
United States v. *Sandoval*, 231 U.S. 28	8, 12
United States v. *Wheeler*, 435 U.S. 313	7, 12
Veazie v. *Moore*, 55 U.S. (14 How.) 567	12
Williams v. *United States*, 237 U.S. 711	9
Wilson v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979)	11

Statutes:

Act of July 2, 1948, ch. 809, 62 Stat. 1224, 25 U.S.C. 232	9
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588	9
Act of Aug. 23, 1954, ch. 831, 68 Stat. 768	9
Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592	9

Cases—Continued — Page

Act of Apr. 12, 1968, Pub. L. No. 90-287, 82 Stat. 93 — 9
Act of July 26, 1977, Pub. L. No. 95-74, 91 Stat. 285 — 7
Act of Sept. 30, 1978, Pub. L. No. 95-395, Section 9, 92 Stat. 813 — 9
Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 *et seq.* — 11
Major Crimes Act, 18 U.S.C. 1153 — 3
18 U.S.C. 13 — 9
18 U.S.C. 1151 — 3, 4, 6, 8, 9
18 U.S.C. 1152 — 9
Fla. Stat. Ann. § 285.16 (West 1975) — 9

Miscellaneous:

Federal and State Indian Reservations and Indian Trust Areas, Dept. of Commerce (1974) — 10
44 Fed. Reg. 7235-7237 (1979) — 6
15 *Handbook of North American Indians*, "*Northeast*" (Smithsonian Institution, Washington 1978) — 2
S. 1273, 96th Cong., 1st Sess. (1979) — 11
S. Rep. No. 95-276, 95th Cong., 1st Sess. (1977) — 7
S. Rep. No. 96-481, 96th Cong., 1st Sess. (1979) — 11
T. Taylor, *The States and Their Indian Citizens*, Dept. of the Interior (1972) — 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-539

STATE OF MAINE, PETITIONER

v.

CHARLES ALBERT DANA, JR.

and

ALLAN SOCKABASIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of December 10, 1979.

STATEMENT

1. At the time of the American Revolution, the Passamaquoddy Indians were one of the tribes inhabiting the territory which is now encompassed by

the State of Maine. In 1794, that Tribe entered into an agreement with the State of Massachusetts (Maine's predecessor) under which the Tribe purported to release its claims to land and in return Massachusetts guaranteed the Tribe certain parcels of land which the Tribe was to occupy. See *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 374 (1st Cir. 1975). One of the reservations established by the 1794 treaty is today's Indian Township Reservation. See 15 *Handbook of North American Indians, "Northeast,"* at 124-125. (Smithsonian Institution, Washington 1978).

Although there was some contact between the central government and the Passamaquoddy Tribe in revolutionary times, there had been no federal involvement with that Tribe for more than 140 years as of April, 1977, when the alleged offenses occurred. There were no federal treaties entered into with the Tribe, no federal statutes expressly mentioning the Tribe, and no federal administrative action concerning the Tribe. By contrast, since becoming a state in 1820 Maine has enacted more than 350 statutes expressly relating to the Tribe and making provision for its well-being. See *Joint Tribal Council, supra*, 528 F.2d at 374.

2. The indictments in the present case were returned May 3, 1977, and alleged that the respondents had committed arson within the Indian Township Reservation on April 16, 1977. Each defendant pleaded not guilty, and a jury trial was held. Evidence presented as part of the State's case indicated that each of the defendants was an Indian and that the crime was committed on the reservation. When the State rested its case in chief, the defendants moved to dismiss the indictments because the state court lacked jurisdiction over the subject matter. Their submission was that the offenses occurred within "Indian country" as that term is defined in 18 U.S.C. 1151 and that, accordingly, exclusive federal jurisdiction attached under the Major Crimes Act, 18 U.S.C. 1153. See *United States* v. *John*, 437 U.S. 634 (1978). By agreement, this issue was postponed until after the case had been submitted to the jury (Pet. App. A3).

The jury found the respondents guilty as charged and the respondents therefore filed a motion in arrest of judgment asking dismissal for lack of subject matter jurisdiction. Evidence presented at the hearing on the motion showed that the respondents were Passamaquoddy Indians by descent and heritage and were listed as members of the Tribe on its rolls, that respondents lived on the reservation at Peter Dana Point, and that the reservation was inhabitated by members of the Tribe (Pet. App. A4). Nonetheless, the trial court denied the motion in a written order dated April 3, 1978 (Pet. App. B).

3. The respondents appealed to the Supreme Judicial Court of the State of Maine. On July 3, 1979, that court entered an opinion and remanded the case to the trial court for further proceedings (Pet. App. A). The court found that "dependent Indian community," as the term is used in 18 U.S.C. 1151, in-

cludes all Indian tribes with a specific land base within the United States which are dependent on the United States, regardless whether the United States has actively dealt with those tribes (Pet. App. A12). The court found that the relationship of dependency exists when the United States has undertaken to protect the land held by a tribe by forbidding the sale of that land except with federal consent (Pet. App. A13-A18). The court concluded that under federal law the United States had indeed undertaken to protect "Indian title" of all *bona fide* tribes within the boundaries of the United States as of 1790, and that if the Passamaquoddy Tribe was such a tribe in 1790 and also in April of 1977, then it was a "dependent Indian community" within the meaning of 18 U.S.C. 1151 (Pet. App. A18-A22). Accordingly, the court remanded the case to the trial court for a determination of the Tribe's status as an Indian tribe in 1790 and 1977 (Pet. App. A22).

The court made clear that its decision only governed offenses committed on land actually occupied by the Indians and did not apply to other land claimed by the Indians. Thus, the court stated (Pet. App. A25 n.11):

> We are concerned, here, *only* with the question of whether there may be federal jurisdiction over certain major crimes committed by an Indian on particular land in Maine which now is, and for a long time has been, inhabited by the Passamaquoddy Tribe. As to this land, no private third party claims of ownership, or rights of occupancy, are involved. Thus, in deciding as we have, we intimate no opinion upon the merits

> of the dispute in which the Passamaquoddy Tribe has been, and still is, engaged with the federal government and the State of Maine in regard to other Maine lands which now are, and for a long time have been, occupied by private third persons who claim title, or other rights, in those lands.

The State now petitions for a writ of certiorari from the judgment of the Supreme Judicial Court of Maine.

ARGUMENT

The decision below presents an interesting and difficult question, but one which, as it seems to us, is not of sufficient continuing importance to warrant review here. Within Maine, the effect of the decision is largely superseded by federal acknowledgement of Maine's Passamaquoddy and Penobscot Tribes as Indian tribes eligible for federal services, and also by the federal government's supplying of those services. Outside of Maine, there are very few Indian tribes with "state reservations" implicating the question presented here, and all but two of those tribes are seeking federal recognition which should moot the issue. Nor is the decision of the court below in conflict with decisions of this Court or other appellate courts.

1. In the State of Maine, there are two tribes of Indians living on reservations set apart for them by the State, the Passamaquoddy Tribe and the Penobscot Tribe. Because, until very recently, the United States took no active role in supervising or protecting

the Indians on these reservations, it is uncertain whether those reservations—including the Indian Township Reservation where the alleged offenses occurred—qualified as "Indian country" within the meaning of 18 U.S.C. 1151. But that issue is mooted as respects all reservations of those tribes for the future.

As we have noted, the federal government has acknowledged the tribal status of the Passamaquoddy and Penobscot Tribes. In a notice published in the Federal Register on February 6, 1979 (44 Fed. Reg. 7235-7237), the Department of the Interior stated:

> Notice is hereby given in accordance with 25 CFR 54.6(b) by the Bureau of Indian Affairs of the tribal entities that have a government-to-government relationship with the United States. The United States recognizes its trust responsibility to these Indian entities and, therefore, acknowledges their eligibility for programs administered by the Bureau of Indian Affairs.

Included in the listed Indian tribes are the Passamaquoddy and Penobscot Tribes.

Moreover, the Department of the Interior has provided well over $1.5 million worth of services to the two Tribes in fiscal year 1979, in the areas of education, economic development, employment, management of natural resources, and other services. The Department has also budgeted similar amounts for these services in fiscal year 1980.[1]

---

[1] Indeed, even earlier, federal monies had been appropriated for the benefit of these tribes. Thus, on July 26, 1977, Congress provided funds for the Tribe to be expended by the Bureau of Indian Affairs for the Tribes' benefit. Act of July 26, 1977, Pub. L. No. 95-74, 91 Stat. 285, 292. See S. Rep. No. 95-276, 95th Cong., 1st Sess. 27 (1977).

Thus, while there may have been reason to question the tribal and dependent status of the Passamaquoddy and Penobscot Tribes in 1977, that doubt is gone today.[2] Those Tribes are now federally-recognized tribes, dependent on the United States for services as well as for the protection of their land base (see pages 11-12, *infra*).[3] It follows that the

---

[2] Maine does not question that the federal government has the constitutional power to treat the Passamaquoddy and Penobscot Tribes as Indians. See the State's brief in response to the brief of the Passamaquoddy Tribe, in the Supreme Judicial Court, at 28. (But see Pet. 8.) Nor is there any question that Indian country may exist east of the Mississippi, and belong to Indians whose tribal existence was not recognized, for a period of time, by the United States. *United States* v. *John*, 437 U.S. 634 (1978).

[3] In its Federal Register notice, the Department of the Interior acknowledged the status of the Passamaquoddy and Penobscot Tribes as Indian tribes. In our view, that Department has ample authority to acknowledge the tribal existence of those Tribes on behalf of the United States. As this Court stated in *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974) (footnotes omitted):

> In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA.

Similarly, see *United States* v. *Wheeler*, 435 U.S. 313, 328 n.27 (1978).

Moreover, and specifically with regard to recognition of Indian tribes, this Court acknowledged the special duty of

reservations of the Maine tribes presently qualify under 18 U.S.C. 1151 both as "land within the limits of any Indian reservation under the jurisdiction of the United States Government" and as "dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State * * *." See, *e.g.*, *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *McGowan*, 302 U.S. 535 (1938); *United States* v. *Martine*, 442 F.2d 1022 (10th Cir. 1971).

What is more, the question whether the state government may assert criminal jurisdiction over Indians on Maine reservations is likely to be settled by express statute in the reasonably near future. At the present time an action is pending in the United States District Court for the District of Maine, *United States* v. *Maine*, Nos. 1966-N.D. and 1969-N.D., in which the Tribes claim aboriginal title to a substantial portion of land in Maine. That action will likely be settled through federal legislation, which, we anticipate, will expressly resolve the question of jurisdiction over Indians on the Indian reservation in Maine. This was the approach Congress adopted to

---

the Executive Branch in *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865):

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

settle land claims by Rhode Island Indians. Act of Sept. 30, 1978, Pub. L. No. 95-395, 92 Stat. 813. Section 9 of that Act expressly provides that the State will have civil and criminal jurisdiction over the lands involved.[4]

Accordingly, any long-term effect of the decision below in the State of Maine has been superseded by subsequent events. While the present case is not moot, there appear to be few pending cases in the same posture and none can arise in future.[5]

---

[4] Questions of federal or state criminal jurisdiction have similarly been clarified by statute in other states. The state with most "state reservations" is New York, and that State has jurisdiction over crimes on those reservations by statute. Act of July 2, 1948, ch. 809, 62 Stat. 1224, 25 U.S.C. 232. In other situations, Congress has acted to terminate federal supervision over Indians on certain "state reservations" and has made clear that state criminal law applies. Act of Apr. 12, 1968, Pub. L. No. 90-287, 82 Stat. 93 (Tiwa Indians of Ysleta, Texas); Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592 (Catawba Indians of South Carolina); Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (Alabama and Coushatta Tribes of Texas). One state, Florida, assumed jurisdiction pursuant to "Public Law 280" (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588). See Fla. Stat. Ann. § 285.16 (West 1975).

[5] On page 10 of its petition, Maine states that there are a number of cases in Maine courts which would have to be dismissed if the decision below is upheld, including one indictment for homicide. We perceive no significant hiatus in law enforcement on the reservations. For major crimes, the federal courts have jurisdiction under 18 U.S.C. 1151 and 1153, and in fact the homicide case mentioned in the State's brief was later brought in federal district court. Other crimes, involving Indians and non-Indians, are subject to the jurisdiction of federal courts. See 18 U.S.C. 13, 1152; *Williams* v. *United States*, 327 U.S. 711, 713 (1946). Crimes involving Indians only are subject to tribal jurisdiction.

2. Maine argues (Pet. 11-12) that the decision of the Supreme Judicial Court of Maine will have an important effect on states outside of Maine. To the contrary, the Maine court made clear that its decision was limited to discrete communities which had long been occupied by Indians (Pet. App. A25 n.11). Claims to land by Indian groups do not come within the scope of the court's reasoning.

To the best of our knowledge, there are only six possibly significant "state reservations" where the question of state or federal law enforcement might become an issue.[6] In four of these, the tribes occupying the reservations are seeking federal recog-

---

[6] The reservations are: Eastern Pequot Reservation, Connecticut (220 acres, 11-19 residents); Western Pequot Reservation, Connecticut (175-184 acres, 2 residents); Pottawatomi Reservation of the Huron Community, Michigan (120 acres, 50-157 residents); Mattaponi Reservation, Virginia (50-382 acres, 65-75 residents); Pamunkey Reservation, Virginia, (800 [illegible]-1,075 acres, 33-35 residents). T. Taylor, *The States and Their Indian Citizens*, Dept. of the Interior (1972), Appendix J; *Federal and State Indian Reservations and Indian Trust Areas*, Dept. of Commerce (1974). Also, in Michigan, there is a reservation held in trust by a county, Peshawbestown Reservation (about 120 acres, number of residents unknown). This reservation was brought to our attention by the Department of the Interior.

Other state reservations are insignificant: Grafton Reservation, Massachusetts (11.9 acres, 1 resident); Golden Hill Reservation, Connecticut (1 lot, 2 residents); Schagticoke Reservation, Connecticut (400 acres, 0-2 residents); Cornplanter Reservation, Pennsylvania (unknown number of acres, no residents). In addition, there is a reservation for Southern Paiute Indians in Utah of 40 acres or less. Under bills currently pending in Congress (which have passed the Senate)

nition.[7] The remaining two reservations are small, totaling approximately 100 occupants, and we have no indication that any law and order problem exists in those areas. In sum, there is no reason to believe that the decision of the Maine court will create any significant problems outside of that State.[8]

3. The State asserts a conflict between the decision below and decisions of this Court, in particular *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979). To be sure, in *Wilson*, the Court construed the Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 *et seq.*, as inapplicable to eastern states. But that ruling is not inconsistent with the Maine court's conclusion that, since 1790, the Indian tribes of Maine could not alienate their land without the permission of the federal government.

---

the reservation will become a federal reservation and the jurisdiction question expressly resolved. See S. 1273, 96th Cong., 1st Sess. (1979); S. Rep. No. 96-481, 96th Cong., 1st Sess. (1979).

[7] These are the two Connecticut reservations and the two reservations in Michigan.

[8] In its petition (at 12), the State cites several Indian tribes which it suggests might raise problems of criminal jurisdiction. Two of these tribes, the Narragansetts of Rhode Island and the Catawbas of South Carolina, have already been dealt with by federal statute. See pages 8-9 and note 4, *supra*. The Gay Head and Mashpee Indians (both of which are Wampanoag groups) do not have a present base of trust land, nor do the Mohegans of Connecticut. While the Schagtichke Indians of Connecticut apparently have a trust land of 400 acres, it is virtually without residents. See Taylor, *supra*, at Appendix J.

The full answer to the State's claim is given in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974), expressly holding that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." As was later explained in *Wheeler* v. *United States*, 435 U.S. 313, 326 (1978), the rule exists independently of the Trade and Intercourse Acts: it derives from the "dependent status" of Indian tribes within the United States. Obviously, any geographic limitation in the 1834 Act is irrelevant to the question.[9]

---

[9] The State also argues (Pet. 7) that the decision of the Supreme Judicial Court is contrary to *Sandoval*, *supra*, since that case recognizes the unique role of the federal government in recognizing Indian tribes. The question before the Supreme Judicial Court, however, was whether 18 U.S.C. 1151 included previously "unrecognized" tribes, a question of statutory interpretation which the court was plainly competent to decide.

The State also argues (Pet. 8-9) that the decision below is in conflict with *Veazie* v. *Moore*, 55 U.S. (14 How.) 567 (1852). That case is properly distinguished by the Maine court (Pet. App. A18-A19).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

JANUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 308815 194